

FINANCIAL INSTITUTIONS COMMITTEE MEETING
Business Law Section, State Bar of California

Meeting of September 13, 2005

Committee Members Present: Jim Rockett, Chair; John Hancock; Vice Chair, Meg Troughton, Secretary; Sally Brown; Joseph Catalano; Leland Chan; Andrew Drutch; James Dyer; Bartley Dzivi; Mark Gillett; Eric Kawamura; Teryl Murabayashi; Neil Rubenstein; Rosemary Oda; Isabelle Ord; Brad Seiling; and Trude Tsujimoto.

Committee Members Absent: Gordon Eng; Jay Gould; Robert Hale; Linda Iannone; Kenneth Krown; Rosemary Lemmis; Patricia Navis; Allan Ono; Peggy Standefer; and Richard Zahm.

Incoming Class of 2008: Bruce Belton; Laura Dorman; Randall Kennon; Russell Schrader; Robert Stumpf and Keith Ungles.

Advisory Members and Others in Attendance: Michael Agoglia; Roland Brandel; Gino Chilleri; Clay Coon; Victor Hsu, Ted Kitada; Bob Mulford; Kenneth Scott; Jennifer Sostrin; and Maureen Young.

Call to Order: Jim Rockett called the meeting to order at 9:30 AM.

Honors to Jim Rockett: Roland Brandel addressed the Committee with comments on Jim's spectacular work during his years as a member and especially his role as Chair of the Committee for 2004-05. Roland noted that the Executive Committee of the Bar and other Bar cognoscenti recognized that the significant contributions of the Committee were due, in great part, to Jim's leadership. The Committee cheered its approval of Roland's comments.

1. Approval of August 9, 2005 Minutes: The Committee approved the minutes of the August 9, 2005 meeting.

2. Committee State Bar Convention Panel: Isabelle Ord reported that the Committee's panel at the State Bar Convention had good attendance for the time slot given and competition with a judicial panel. Nineteen people attended and Isabelle has received the comments that were quite favorable. Some attendees stated the panel was very good and should be repeated.

3. Fair Credit Reporting act Case: Reynolds v. Hartford Financial Services Inc, et. al.: Michael Agoglia of Morrison and Foerster educated the Committee on a recent decision respecting the Fair Credit Reporting Act. The Committee had previously received a copy of a digest of the case Michael had written and he was kind enough to summarize the facts and holdings as a prelude to a discussion of the implications. In a nutshell, the holding was that setting the initial insurance premium could be considered adverse action, requiring proper notice to the customer. In a case joined with Reynolds,

the court found that a “no hit” credit report could also be the basis for required notice. The court also expanded the necessary elements of the customer notice, including more specificity as to the affect on the consumer than the industry previously thought was necessary. Michael noted that the question of the insurance company’s willfulness in its failure to give notice is on appeal.

Michael speculated that the FCRA case may be a new hot area for litigation with the potential for large damage awards. There are 50 or so class actions pending right now.

Jim asked if there would be split of opinion among the circuits in the near future. Michael responded that there are some cases being worked out but, preliminarily, they do not look like they will present a split of opinion.

Ted Kitada asked how specific Michael thought a Reynolds-compliant notice of adverse action needs to be. Michael responded that it is not clear but that it could be read to mean an insurer would have to specify: “your premium was increased by \$X because your credit score was Y.” Ted also asked what should be done if a credit report user uses multiple credit reports/scores. Michael said this, too, is unclear but some might argue that either each report/score be addressed or an explanation of how a blended report/score was created and the consequences may be required.

Jim asked if the case is limited to insurance industry use of reports/scores. Michael responded that looking at the case holding probably leads to the conclusion that the same result applies to creditors. The questions are raised by the court’s analysis; if the analysis is correct and upheld, it could lead to the same conclusion for creditors.

4. Jury Trial Waivers After Grafton Partners: Neil Rubenstein and Joe Catalano prepared some remarks about practical issues following the ruling in Grafton Partners v. Superior Court. Neil had shared a very useful digest of the facts and holding of the case that was distributed to the Committee prior to the meeting. (Note: Sally Brown interjected that she had used information from Neil’s digest earlier the morning of the Committee meeting on a client call.) Neil commented that the holding will change how disputes are handled by some. It may encourage more settlements. He also noted that while the case was between commercial parties, the relevant code (Code of Civil Procedure Section 631) does not distinguish between commercial and consumer parties. The large question is, of course, what do financial institutions do with the provisions in current contracts? The answer is unclear but it probably doesn’t require a change in terms. For new contracts, a financial institution might include a jury waiver with an additional savings clause, such as, “as permitted by applicable law.” In part, this keeps the financial institutions’ options open in case of different results in federal courts. Also, with respect to consumer contracts, counsel should look at the Consumer Legal Remedies Act and decide if it is acceptable, even with a savings clause.

Neil spoke of using judicial reference as an alternative. Neil has had some practical experience with judicial reference and noted costs can be an issue. Neil summarized some of the judicial reference procedural rules in his digest and suggested members be

familiar with them before deciding. In a similar vein, Neil suggested thinking about including a mediation clause in contracts.

Bruce Belton asked how pre-trial actions (e.g. set-off, writ of attachment, etc.) worked when using judicial reference. Neil said he commonly carves such actions out of his judicial reference clause. Neil also mentioned the parties could set choice of law and forum in contracts without running afoul of the ruling.

Joe Catalano shared his perspective on judicial reference and indicated that Union Bank of California was moving towards using it more and more because it allows appellate review and avoids threats of jury trials as a bargaining chip.

Joe stated the need for a legislative fix. In terms of approach to the California Legislature, he speculated that it would be safer to try for a fix related to commercial contracts only.

With respect to current contracts, Joe does not see a need to make changes; simply don't enforce the provision. For new contracts, for the reasons already discussed, UBOC is changing to use of judicial reference in some contracts and leaving others along with the expectation that there will be a legislative fix.

5. State Bar Interest in Amendments to CCP Section 631: Jennifer Sostrin, Liaison for the Financial Institutions Committee to the Corporations Section, along with Victor Hsu of the Corporations Committee, joined us to provide information on the Corporations Committee's efforts related to a legislative fix to Grafton. Victor informed us that a subcommittee of the Corporations Committee was being formed to work on language. Some on the Corporations Committee have expressed concern that to make a legislative proposal that included all consumer transactions is not likely to pass. There is some interest in including some consumer contracts within the fix; possibly based on a dollar amount per transaction.

Neil suggested the Financial Institutions Committee and the California Bankers Association assist the Corporations Committee, especially with some practical issues in the consumer contract area. Joe remarked that it would not be wise to get an "easy" fix that leaves out consumer transactions thereby setting in stone a consumer's right to a jury trial. Jim suggested our Committee have a subcommittee of three or so members to work with the Corporations Committee. Members with an interest are to be mailed to John Hancock.

Jim also reported that the California Bankers Association looked at the possibility of trying to get something passed on an urgency basis in this legislative year. The idea was dropped because of some concerns that it might be rejected as an urgent matter. Leland also reported that California Bankers Association will take a supportive role with the California Chamber of Commerce taking the lead on this legislation next year.

6. Stored Value Cards FDIC Proposed Guidance: Mark Gillett gave an insightful digest of the FDIC's recent (August 2005) reissuance of a proposal addressing the question of whether financial institutions-issued stored value cards are "deposits." The FDIC has been quiet in this area since last November's guidance on payroll cards. The FDIC asks for comments on a number of programs. The proposal does suggest there may be instances where the financial institution can determine whether the account is a "deposit" based on the contract term. The proposal addressed the possibility that a financial institution might decide to treat the amounts as deposit and have such deposits covered by insurance.

Ted mentioned a California debit card law that tracks federal definitions of account requiring error resolution and burdensome liability. Based on the customer identification requirements of this California law, when Wells Fargo sold gift cards, they sold them only to existing customer. Mark reflexed that customer identification for cardholders may be coming soon.

7. Bank Secrecy Act Examination Procedures: Maureen Young gave a thorough report on the new Bank Secrecy Act Examination Handbook. Maureen had provided a good deal of written materials from some earlier industry conferences prior to the Committee meeting. Maureen remarked that, in general, the Handbook works well for the agency examiners but is not particularly helpful for building a compliance plan. There is continued emphasis on written policies. The written policies are to include evidence of the determining factors in setting its risk appetite. An institution's procedures should include clear and detailed actions to be followed in meeting the BSA rules.

Maureen also reported that the Office of the Comptroller of the Currency is planning a pilot program for a small number of banks. The pilot program would put aside the institution's written policies and procedures and exam only the actual operations and results. Whether an institution is picked for the pilot or a more usual exam, Maureen suggested considering a test of policies and results by an independent third party.

8. Federal Legislative Report: Bart Dizivi updated the Committee on SB 1408 which would create the Identity Theft Protection Act. It has passed the Commerce Committee and it is clear that the topic of identity theft is not going away.

Bart noted the Consumer Federation of America suggested a statutory exemption from the new Bankruptcy Laws for victims of natural disasters. In particular, CFA wants the victims of natural disasters to be exempt from the new filing requirements.

9. State Legislative Report: Bob Mulford provided a scholarly written report of California legislation prior to the meeting. He noted that the Legislature is out of session for the year and that some Bills are still being enrolled. Bob mentioned that a Bill that would have made funds available earlier than required by Federal Reserve Board Regulation CC was vetoed by Governor Schwarzenegger.

10. Elder Abuse Legislation: Leland Chan summarized SB 1018, Chapter 140, Statutes of 2005, which requires financial institutions to report certain elder financial abuse effective January 1, 2007. Leland encouraged a broad reading of those who are covered reporters. In instances where more than one employee is covered, it is acceptable to agree to one report by one of the employees. In this regard, it is acceptable to designate a central location for reporting. The overall result of this Bill is financial institutions need to draft and implement lots of new policies, procedures and provide considerable training.

What is to be included in the reports is unclear. Some of the provisions are substantially similar to the reports in Government Code 7480. A report is to be made within 48 hours of the incident. The privilege for reported information is a qualified one. The Bill includes separate fines for failure to report and for willful interference with a report by a supervisor or administrator who interferes with the reporter fulfilling his or her duty to report. More details will be given in a California Bankers Association Bulletin on this Bill.

Ted suggests any incident that mandates reporting will also require a SAR report.

11. Resolution of Committee Appreciation to Howard Gould: Jim Rockett iterated that Howard Gould, Commissioner of Financial Institutions, announced he is stepping down from that office. The Committee unanimously voted the following Resolution be adopted and a copy sent to Commissioner Gould.

“WHEREAS, Howard Gould has announced that he is stepping down as Commissioner of Financial Institutions for the State of California; and

WHEREAS, during his period in office, Commissioner Gould has made a significant difference to the Department of Financial Institutions and the state entities that it regulates; and

WHEREAS, Commission Gould leaves a legacy of great accomplishment in the California banking industry; and

WHEREAS, Commissioner Gould generously gave his time to this Committee by meeting with the State Bar Financial Institutions Committee to share his vision for the Department of Financial Institutions.

NOW THEREFORE IT IS RESOLVED, that the California State Bar Financial Institutions Committee thanks Commissioner Howard Gould for his service to the people of the State of California, congratulates him on a job well done and wishes Commissioner Gould great success in his future endeavors.

ADOPTED on this 13th day of September 2005 at its regular monthly meeting by the California State Bar Financial Institutions Committee.”

12. Farewell from Jim Rockett as Chair of the Committee: Jim thanked the Committee for the great attendance and discussions at Committee meetings. He encourages the Committee to continue its outreach efforts and work on special issues, such as financial elder abuse.

13. Farewell to Jim Rockett as Chair of the Committee: Several Committee members spoke of the outstanding leadership Jim had provided to the Committee throughout his membership and particularly this last year as Chair. The Committee especially noted Jim's fine work in expanding the Committee's outreach to other Sections of the Bar and broader audiences. He was also recognized for his work in covering the breadth of topics of interest to financial institutions' practitioners. The Committee offered a rousing round of applause for his work and personal attention to everything the Committee worked on this past year.

14. Adjournment: The meeting was adjourned at 11:32 AM (with Jim's apologies for running two minutes over the usual time for adjournment.) The next regularly scheduled meeting will be October 11, 2005.

Respectfully submitted:
Meg Troughton, Secretary